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No. 02-381

IN THE

Supreme Court of the United States

TRANSEURO AMERTRANS WORLDWIDE MOVING AND RELOCATIONS LIMITED,
Plaintiff-Petitioner,

v.

CONOCO INC. AND PHILLIPS PETROLEUM COMPANY,
Defendants-Respondents.

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of Oklahoma

RESPONDENTS' OPPOSITION TO WRIT OF MANDAMUS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should this Court issue a Writ of Mandamus to reverse a ruling by the district court affirming a discovery order by a magistrate judge that allowed Petitioner to depose Senior Vice-Presidents but precluded deposition of Defendants' Chief Executive Officers ("CEOs") where (i) there has been no abuse of power by the district court and no novel question of law is presented; (ii) simultaneous with its Petition for mandamus, Petitioner has been pursuing as a remedy a renewed Motion to Expedite and Compel the Depositions of the CEOs before the district court; and (iii) the pretext for the Petition—a need to depose the CEOs prior to a hearing on Petitioner's motion for a preliminary injunction enjoining the ConocoPhillips Merger—no longer exists now that the Merger has been consummated and the preliminary injunction hearing has occurred.

CORPORATE DISCLOSURE STATEMENT

Conoco Inc. and Phillips Petroleum Company are wholly owned subsidiaries of ConocoPhillips.

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OPINIONS BELOW

Two opinions omitted from Petitioner's Appendix are included in Respondents' Appendix. On August 22, 2002, Judge Holmes issued a ruling denying Petitioner's application for a temporary restraining order and setting a preliminary injunction hearing. Resp. App. 6a. On September 6, 2002, Magistrate Judge Cleary issued a decision denying Petitioner's Motion to Expedite and Compel the Depositions of Messrs. Mulva and Dunham (Respondents' Chief Executive Officers). Resp. App. 1a.

Defendants Conoco Inc. ("Conoco") and Phillips Petroleum Company ("Phillips"), now wholly owned subsidiaries of ConocoPhillips, oppose the Petition for Mandamus filed by

Petitioner Transeuro Amertrans Worldwide Moving and Relocations Limited ("Transeuro"). Transeuro inappropriately invokes mandamus to ask this Court to overturn discovery rulings by the district court. These rulings allowed Transeuro to depose Senior Vice-Presidents of Conoco and Phillips but precluded Transeuro from initially deposing the Chief Executive Officers ("CEOs") of Conoco and Phillips.

Transeuro's Petition for Mandamus should be denied. First, mandamus is an extraordinary remedy, not allowed to secure interlocutory review of garden-variety discovery disputes. Second, Petitioner failed to disclose to this Court that, contemporaneous with filing its Petition for Mandamus, Transeuro filed a renewed "Motion to Expedite and Compel the Depositions of Messrs. Dunham and Mulva" before Magistrate Judge Paul Cleary (N.D. Okla.). This motion is now pending before the district court judge, the Honorable Sven Erik Holmes (N.D. Okla.). Pursuant to U.S. Sup. Ct. R. 20, mandamus may not issue when another remedy is available to—and being pursued by—the Petitioner. Third, the decisions issued by Judge Holmes and Magistrate Judge Cleary appropriately ordered depositions of a Senior Vice-President of Conoco and a Senior Vice-President of Phillips in lieu of requiring that the CEOs be deposed, given the status of the proceedings. Certainly this discretionary discovery ruling does not represent an abuse of judicial power.

COUNTERSTATEMENT OF THE CASE

1. On April 30, 2002, Transeuro, a U.K. moving services company, filed its complaint in this action, seeking to enjoin the then-pending merger of Conoco and Phillips in an injunctive action predicated under Section 16 of the Clayton Act, 15 U.S.C. § 26. The ConocoPhillips merger was publicly announced in November 2001.

2. On August 20, 2002, Transeuro filed a motion for a temporary restraining order ("TRO") to block the merger, on the basis that approval of the merger by the Federal Trade Commission ("FTC") was imminent.

3. On August 22, 2002, Judge Holmes conducted a hearing on Transeuro's application for TRO relief. Judge Holmes denied the motion for a TRO because Transeuro had failed to show irreparable injury, likelihood of success on the merits, or that the balance of harms or public interest favored Transeuro. Resp. App. 6a, 9a-11a. Judge Holmes observed that Transeuro's standing was questionable given lack of evidence of its status as a purchaser of gasoline in the United States. Judge Holmes set a preliminary injunction hearing for September 11, 2002. *Id.* Judge Holmes tasked Magistrate Judge Paul Cleary with supervising a plan for discovery prior to the preliminary injunction hearing. *Id.*

4. On August 26, 2002, Transeuro and Defendants filed proposed discovery plans before Magistrate Judge Cleary. Transeuro sought four company witnesses for deposition: Archie Dunham, Chairman and CEO of Conoco; C.W. Mulva, Chairman and CEO of Phillips; Philip Frederickson, Senior Vice-President of Conoco; and John Lowe, Senior Vice-President of Phillips. On August 27, 2002, Magistrate Judge Cleary heard Transeuro's discovery arguments for two hours before concluding that Transeuro would be permitted to depose Messrs. Frederickson and Lowe but had not justified its request for CEO discovery. Pet. App. 2-61.[1]

5. Later in the day on August 27, 2002, Transeuro appealed Magistrate Judge Cleary's discovery ruling to Judge Holmes. Judge Holmes convened an emergency hearing of almost an hour's duration. At the hearing, Defendants represented to the Court that Messrs. Frederickson and Lowe

[1] In addition to Petitioner's Motion to Depose the CEOs, the hearing also addressed other discovery issues.

would have been Defendants' 30(b)(6) witnesses with respect to the transaction. Judge Holmes found that Transeuro failed to meet the criteria for overturning a magistrate's order under Fed. R. Civ. P. 72. Pet. App. 62-81.

6. On August 29, 2002, Transeuro filed a petition for mandamus with the Tenth Circuit to seek the depositions of Messrs. Dunham and Mulva.

7. On August 30, 2002, the FTC gave conditional approval to the ConocoPhillips Merger. On that same date, the Merger was consummated. Resp. App. 13a.

8. On September 4, 2002, Transeuro's mandamus petition was summarily denied by the Tenth Circuit without requesting responsive briefs. Pet. App. 1.

9. On September 5, 2002, Defendants filed a Motion for Summary Judgment to dismiss the complaint for lack of antitrust standing based on testimony of Transeuro's Rule 30(b)(6) deponent at a deposition conducted on August 28, 2002, in which the deponent (Mr. Barry Schick, Transeuro's sole U.S. representative) admitted that Transeuro did not purchase gasoline in the United States.

10. On September 5, 2002, Transeuro filed a renewed motion to depose Defendants' CEOs before Magistrate Judge Cleary. The pleading was captioned as a "Motion to Expedite and Compel the Depositions of Messrs. Dunham and Mulva" (the "Renewed Motion to Depose the CEOs").

11. On September 6, 2002, Transeuro filed the instant Petition for a Writ of Mandamus with this Court seeking review of the CEO deposition discovery dispute. Transeuro failed to disclose in its Petition that Transeuro had on September 5 filed a Renewed Motion to Depose the CEOs and that this motion was pending before Magistrate Judge Cleary at the time the Petition was filed.

12. On September 6, 2002, the same day that Transeuro filed its Mandamus Petition with this Court, Magistrate Judge Cleary heard Transeuro's September 5, 2002 Renewed Motion to Depose the CEOs. Later on September 6, 2002, Magistrate Judge Cleary issued a decision denying Transeuro's Renewed Motion. Resp. App. 1a. The Magistrate Judge determined that the burden/expense of the CEO depositions outweighed the likely benefit and that the Plaintiff was not being deprived of essential evidence. Resp. App. 4a.

13. On September 6, 2002, Transeuro's counsel filed a motion to adjourn the September 11 hearing due to a death in the family of Transeuro's lead counsel. The motion was unopposed and the hearing was adjourned until September 17, 2002.

14. On September 9, 2002, Transeuro appealed to Judge Holmes Magistrate Judge Cleary's September 6, 2002 ruling denying Transeuro's Renewed Motion to Depose the CEOs.

15. On September 13, 2002, Judge Holmes held a hearing to consider Transeuro's September 9, 2002 appeal of Magistrate Judge Cleary's September 6, 2002 ruling. Judge Holmes took the Renewed Motion to Depose the CEOs under advisement.

16. On September 16, 2002, Transeuro filed a Motion for Preliminary Injunctive Relief and for an Order of Divestiture rescinding the Merger. Judge Holmes held a hearing on Transeuro's Motion for Preliminary Injunctive Relief on September 17 and September 18, 2002.

ARGUMENT

I. TRANSEURO FAILS TO MEET THE CRITERIA FOR AN EXTRAORDINARY WRIT

As set forth in Rule 20 of this Court, mandamus is an extraordinary writ, which will issue only when "exceptional circumstances warrant" and "adequate relief cannot be obtained in any other form or from any other court":

> 1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary power, and that adequate relief cannot be obtained in any other form or from any other court.
>
> . . .
>
> 3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office of function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court.

A. Mandamus Does Not Lie For Review Of Routine Discovery Orders

In order to ensure that mandamus relief will only issue in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to achieve the relief it seeks and that he satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 34 (1980).

The federal courts traditionally use mandamus in situations where there has been a judicial usurpation of power. "In

accord with this historic practice, we have held that only 'exceptional circumstances amounting to a judicial consumption of power' will justify issuance of the writ." *Gulfstream Newspaper Corp. v. Mayacampas Corp.*, 485 U.S. 271, 289 (1988), *citing Will v. United States*, 389 U.S. 90, 95 (1967).

Mandamus does not lie for review of garden-variety decisions by lower courts on discovery rules. In *Kerr v. U.S. Dist. Ct. N.D. Calif.*, 426 U.S. 394 (1976), this Court denied a writ of mandamus to compel a district court to vacate discovery orders:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," *Will v. United States, supra*, at 95, the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Ibid.*
>
> Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co. v. Holland, supra*, at 384-385, quoting *Ex parte Fahey, supra*, at 260. More importantly, particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be

> postponed . . . until after final judgment has been rendered by the trial court." *Will v. United States, supra*, at 96; *Parr v. United States*, 351 U.S. 513, 520-521 (1956).

Id. at 402-03. *Cf. Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (granting mandamus to address an issue of first impression calling for the construction of Rule 35 medical examinations but observing that had there only been dispute of what constitutes "good cause," mandamus would not have been appropriate).

Transeuro's Petition for Mandamus does not purport to raise a novel question of law, or issue of first impression, with respect to the lower court's discovery ruling. For this reason alone, the Petition for a Writ of Mandamus must be denied.

B. Mandamus Is Not Appropriate Because Transeuro Has Been Pursuing Alternative Judicial Remedies

While its Petition for Mandamus has been pending (on file since September 6, docketed on September 10), Transeuro has pursued alternative relief by filing on September 5, 2002 a Renewed Motion to Compel the Deposition of the CEOs before Magistrate Judge Cleary; arguing this motion before Judge Cleary (on September 6); and appealing Judge Cleary's ruling to Judge Holmes (on September 9). Transeuro argued the appeal to Judge Holmes on September 13. Having chosen to avail itself of other procedural options, Transeuro's Petition for Mandamus must be denied.

C. Transeuro Failed To Advise The Court Of The Pendency Of Its Renewed Motion To Depose The CEOs Before Judge Holmes

Transeuro should have advised this Court of significant developments that affected its Mandamus Petition pursuant to Sup. Ct. R. 25.5. "Litigants have a continuing duty to inform

the Court of any development which may conceivably affect the outcome of the litigation." *Board of License Commr's v. Pastore*, 469 U.S. 238, 240 (1985); *see also Fusari v. Heinberg*, 419 U.S. 379, 387 n.12 (1975).

The purported basis of Transeuro's Petition for Mandamus is "to allow Petitioner to depose the Chief Executive Officers of Conoco and Phillips prior to the scheduled September 11, 2002, preliminary injunction hearing." Petition for Writ of Mandamus at 1. Petitioner observes that "injunctive relief can become difficult or impossible if the challenged transaction is allowed to go forward." *Id.* at 14. Transeuro failed to advise this Court of key developments subsequent to the filing of the Mandamus Petition, including:

— *Possible mootness of Transeuro's Mandamus Petition since the basis for the Mandamus has evaporated*: Transeuro sought to depose the CEOs prior to the preliminary injunction hearing in an effort to prevent consummation of the ConocoPhillips Merger. Even at the time that the Petition for Mandamus was filed, the Petition made no sense, as the matter would not be resolved by this Court in advance of the preliminary injunction hearing that was the pretext for the need to depose the CEOs. Now that the ConocoPhillips Merger has been consummated and the hearing on Transeuro's Motion for Preliminary Injunctive Relief and Order of Divestiture rescinding the Merger has occurred, the stated justification for the Mandamus Petition has been eliminated or at least significantly altered.[2]

— *Pendency of a Renewed Motion to Compel the Deposition of the CEOs before Magistrate Judge Cleary and*

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[2] Because Transeuro seeks to rescind the Merger, Respondents do not claim that the entire case is moot; however, the basis for the writ—to enable Transeuro to depose the CEOs in order to enjoin the Merger before it is consummated—is no longer tenable.

> *Judge Holmes*. This motion offers Transeuro another avenue of relief; mandamus lies only when there is no other remedy.

Such neglect cannot be dismissed as mere oversight. The consummation of the ConocoPhillips Merger and the occurrence of a hearing on Transeuro's motion to enjoin and rescind the Merger moots or, at the very least significantly changes, the factual landscape underlying the Mandamus Petition. Transeuro's failure to advise this Court of the pendency of its Renewed Motion to Depose the CEOs before Magistrate Judge Cleary and Judge Holmes may reflect a lack of candor on the part of Petitioner since its pursuit of an alternative avenue for relief fatally undermines its Petition for Mandamus.

II. THE ORDERS BY MAGISTRATE JUDGE CLEARY AND JUDGE HOLMES DENYING TRANSEURO CEO DISCOVERY WERE CORRECT, WELL-SUPPORTED, AND CERTAINLY DO NOT REPRESENT AN ABUSE OF JUDICIAL POWER

A. Transeuro's Motion To Depose The CEOs Has Been Thoroughly And Repeatedly Considered

Magistrate Judge Cleary has considered Petitioner's Motion to Depose the CEOs on two occasions (August 27 and September 6, 2002). Judge Holmes has also heard argument on this motion twice (August 27 and September 13, 2002).

Magistrate Judge Cleary had the benefit of the deposition testimony of the Senior Vice-Presidents when he issued his ruling on September 6.[3] Magistrate Judge Cleary was not persuaded that the fact that Messrs. Mulva and Dunham "engage[d] in some discussions and meetings at which

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[3] Mr. Frederickson was deposed on September 4, 2002, and Mr. Lowe was deposed on September 5, 2002.

Frederickson and Lowe were not present . . . justifies the enormous expense and inconvenience necessary to conduct these depositions." Resp. App. 4a. The Magistrate Judge determined that "the burden/expense of the depositions outweighs [the] likely benefit" and that the Plaintiff was not being deprived of essential evidence. *Id.* The Magistrate Judge noted that essential elements involved in determining whether the merger violates the Clayton Act include determination of the relevant geographic market, determination of the relevant product market, and determination of likely anticompetitive effects in these markets. Magistrate Judge Cleary correctly found that determining a relevant market is a necessary predicate to finding a Section 7 violation.[4] Transeuro has made no attempt to demonstrate that the CEOs have personal knowledge, much less unique knowledge, pertaining to the relevant markets in this case, including personal knowledge of the degree of concentration in the national markets for refining and petroleum products

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[4] *United States v. Gen. Dynamics*, 415 U.S. 486, 513 (1974); *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *United States v. E.I du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1307-08 (11th Cir. 1997). "The Court must begin its analysis of assessing the likely competitive effects of the proposed transactions by determining the market shares of the merging firms and the level of concentration in the relevant market." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 52 (D.D.C. 1998). In a Clayton Act case, "in order to prevail, the Plaintiff must carry the burdens of proof and persuasion regarding market definition." *U.S. v. Engelhard Corp.*, 970 F. Supp. 1463, 1466 (M.D. Ga. 1997), *citing FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991); *Lantec, Inc. v. Novell, Inc.*, 2002 U.S. App. LEXIS 19606, at *47 (10th Cir. Sept. 19, 2002) (plaintiffs "bear the burden of defining the relevant market"); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 185 (D.D.C. 2001) (as to market definition, "any gap in the evidence is a flaw in plaintiffs' case—not defendants").

marketing pled in Transeuro's complaint. Magistrate Judge Cleary's September 6, 2002 decision was correct and certainly not clearly erroneous or contrary to law.[5]

B. Transeuro Has Had The Opportunity To Depose Very High-Ranking Executives Of Conoco And Phillips Who Were Fully Involved In The Decision To Proceed With The Merger And Its Motivations

The case law with respect to deposing CEOs holds that discovery is not boundless, and courts may place limits on discovery demands that are unreasonably cumulative or duplicative or where the burden or expense of proposed discovery outweighs its anticipated benefit. The likelihood of harassment and business disruption are factors to be considered in deciding whether to depose corporate executives. *See Six West Retail Acquisition, Inc. v. Sony Theater Mgmt. Corp.*, 203 F.R.D. 98 (S.D.N.Y. 2001); *Consol. Rail Corp. v. Primary Indus. Corp.*, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993).

Transeuro's stated basis to depose the CEOs—that they attended some initial meetings alone—does not show that deposition of the CEOs is needed. Transeuro was not relegated to minor witnesses but rather had the benefit of deposing senior officers knowledgeable about the Conoco-Phillips Merger. As Magistrate Judge Cleary correctly found in his September 6, 2002 order: "While Frederickson and Lowe did not have knowledge of every discussion concerning a possible merger of these two companies, they were directly involved in the merger in the fall of 2001." Resp. App. 4a. Messrs. Frederickson and Lowe had extensive knowledge

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[5] As Magistrate Judge Cleary found, Sherman Act cases cited by Transeuro in support of the need to depose CEOs were inapposite given the different criteria for relief and the pivotal relevance of intent in Sherman Act cases.

about the November 2001 merger transaction between Conoco and Phillips and its motivations. Both officers offered extensive testimony at their depositions about the rationale for the transaction, and its intended benefits and possible synergies.

C. Judge Holmes' and Judge Cleary's Rulings Were Appropriate Given The Status Of The Case

Transeuro failed to meet any of the criteria for TRO relief at the August 22, 2002 hearing. For example, Judge Holmes found that Transeuro's delay in bringing suit and seeking preliminary relief belied its claim of irreparable injury. Resp. App. 9a-10a. During the weeks between the TRO hearing and the preliminary injunction hearing, there was little or nothing that Transeuro could do to establish irreparable injury given its delay in bringing suit and the monetary compensability of any harm. As Magistrate Judge Cleary observed at the August 27, 2002 discovery hearing, discovery to be conducted prior to the preliminary injunction hearing had to be reasonable in scope:

> I'm taking [into] consideration here that the result of the hearing on the TRO was that the Court there found that the plaintiffs—the plaintiff had not met the criteria for a TRO. And although that doesn't conclude, obviously, the question on the appropriateness or your entitlement to a preliminary injunction, I think it does indicate and the Court can take into account that there should be some reasonable limit that would be appropriate that would enable the parties to prepare for that injunction without unduly running up costs at this early date and being unnecessarily intrusive for all parties.

Pet. App. 49. By the time Magistrate Judge Cleary considered Transeuro's Renewed Motion to Depose the CEOs on September 6, 2002, the FTC had approved the Merger and the Merger had been consummated, making the balance of harms

and public interest criteria weigh yet more heavily in favor of Respondents. Respondents had also filed a motion for summary judgment for lack of standing predicated on Transeuro's lack of gasoline purchases. Under the circumstances, Transeuro was afforded a generous amount of discovery prior to the preliminary injunction hearing. The discovery rulings did not abuse the district court's discretion, much less represent usurpation of judicial power.

CONCLUSION

Transeuro's Petition for Mandamus is a thinly disguised effort to obtain interlocutory review of a discovery ruling. Given that the Petition fails to satisfy the criteria for an extraordinary writ, the Petition for Mandamus should be denied.

Respectfully submitted,

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October 10, 2002

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed September 6, 2002]

Case No. 02-CV-342-H(C)

TRANSEURO AMERTRANS WORLDWIDE MOVING AND RELOCATIONS LIMITED,

Plaintiff,

v.

CONOCO, INC., and PHILLIPS PETROLEUM COMPANY,

Defendants.

ORDER

This matter came before the Court on expedited hearing on September 6, 2002, on Plaintiff's Motions to Expedite and Compel the Depositions of Messrs. Dunham and Mulva ("Motion to Compel Depositions''), and Motion to Require Immediate Delivery of Unredacted Hart-Scott-Rodino Documents ("Motion for Unredacted Documents").

The posture of this case is this:

Plaintiff initiated this action on April 30, 2002, alleging violation of Section 7 of the Clayton Act. Thereafter, on August 20, 2002, Plaintiff moved for a Temporary Restraining Order. The District Court heard evidence as to the TRO on August 22, 2002, denying the motion and noting, inter alia, serious questions about Plaintiff s standing to bring this action.

On August 30, 2002, the Federal Trade Commission approved, with certain conditions, the Conoco-Phillips

merger. The Court has been advised that the merger closed that day. (The FTC's proposed Consent Order regarding the merger allows for public comment on the transaction for 30 days. The FTC could than impose additional conditions on the approved merger.)

The parties are now scheduled for hearing on Plaintiff's Motion for Preliminary Injunction on September 11, 2002. The parties are in the process of completing discovery for that hearing, preparing for and deposing each other's expert witnesses in Los Angeles and Tulsa, and drafting proposed Findings of Fact and Conclusions of Law.

On August 27, 2002, the parties appeared before the undersigned U.S. Magistrate Judge to fashion a discovery schedule designed to enable both sides to prepare for the September 11 hearing. At that time, Plaintiff urged that it be allowed to depose the Chief Executive Officers of Conoco and Phillips as part of its discovery. Defendants' request for protective order was granted as to these depositions (the "CEO depositions") "at this time." Plaintiff was told to depose less senior officials with knowledge of the transaction first to determine if the necessary information was available in a less intrusive manner. Plaintiff was not barred from taking the CEO depositions; Plaintiff was required to take other depositions first. If necessary, the Court would then determine if the CEO depositions should be permitted.

Plaintiff proceeded to take the deposition of Philip L. Frederickson, Senior Vice President of Corporate Strategy and Business Development for Conoco, and J.E. Lowe, Senior Vice President of Corporate Strategy and Development for Phillips Petroleum Co. During these depositions, the witnesses acknowledged that they did not directly participate in initial negotiations between Conoco and Phillips concerning the merger and testified that on some occasions, meetings were held in which only CEO Archie Dunham of Conoco and CEO C.W. Mulva of Phillips were

present. Mr. Frederickson testified that he did not participate in merger negotiations prior to November 18, 2001. He testified that in the fall of 2001 Conoco retained investment bankers for a possible Phillips merger. (Exh. "D" to Motion Compel Depositions, p. 9, lines 9-14).

The issue now before the Court is whether the fact that Mulva and Dunham had several private meetings concerning a possible Conoco-Phillips merger is sufficient to require their depositions. The Court believes it is not.

DISCUSSION

It is not surprising that CEOs Mulva and Dunham would have had discussions about a possible merger of their companies. It would have been startling, indeed, had they not had such discussions. The document cited by plaintiff relating to these discussions is the S-4/A filing with the Securities and Exchange Commission dated February 7, 2002. (The document was attached as an exhibit to the Joint Submission of the Parties Regarding Discovery.) That document indicates that Mulva and Dunham met on three occasions between September 28, and November 1, 2001, to discuss a possible merger, and had several telephone conversations. Conoco and Phillips executed a mutual confidentiality agreement on November 6, 2001, to permit each company to perform due diligence. On November 7, 2001, Frederickson and Lowe became directly involved in the merger on behalf of their companies.

Plaintiff's burden is to establish: 1) that Defendants have violated the Clayton Act; 2) that Plaintiff has been directly injured in his business; 3) that the antitrust violation was the direct cause of Plaintiff s injury; and, 4) that Plaintiff has been damaged economically. 15 U.S.C. §§ 15, 18. There are three essential elements involved in determining whether there has been a violation of the Clayton Act: 1) determination of the relevant product market; 2) determination of

the relevant geographic market; and, 3) determination of the likely anticompetitive effects of the merger in the relevant product and geographic markets.

After hearing oral argument and reviewing the briefing herein, the Court concludes, pursuant to Fed. R. Civ. P. 26(b)(2) that the depositions of Mulva and Dunham should not be permitted. Plaintiff has deposed the two senior vice presidents who were intimately involved in the merger of these companies. While Frederickson and Lowe did not have knowledge of every discussion concerning a possible merger of these two companies, they were directly involved in the merger in the fall of 2001. It was at that time, for example, that Conoco hired an investment banker to assist in the merger—a clear sign that it was at that point that the concept of a merger became a real proposal. Depositions of Mulva and Dunham would be unreasonably duplicative as to issues that Frederickson and Lowe have testified to, including events occurring after November 7, 2001. While Mulva and Dunham did engage in some discussions and meetings at which Frederickson and Lowe were not present, the Court is not persuaded that this fact alone justifies the enormous expense and inconvenience necessary to conduct these depositions. This is not a Sherman Act case where intent of the parties could be essential to a determination of the claim. Other than the fact that Dunham and Mulva met privately on several occasions to discuss the merger, Plaintiff has pointed to no specific information that these men have that would assist Plaintiff in making its claim for preliminary injunction. The essential information was available from Messrs. Frederickson and Lowe; thus, Plaintiff is not being denied access to essential evidence. The Court has determined that the burden/expense of these depositions outweighs its likely benefit, especially in light of the specific needs of this case, the importance of the proposed discovery in resolving the issues to be presented to the District Court at the hearing on preliminary injunction.

Plaintiff has argued that corporate CEOs are not immune from giving depositions. While there is no *per se* rule against deposing corporate executives, courts have been sensitive to the disruptive effect and potential for harassment in allowing such discovery. *E.g.*, *Mulvey v. Chrysler Corp.*, 106 F.R.D. (D.R.I. 1985). In this instance, the merger of Conoco and Phillips was closed on August 30. Mr. Mulva and Mr. Dunham are now the chief executives of a newly formed corporation at the critical stage of its existence. To require them to give their depositions would be needlessly disruptive and burdensome; especially, since Plaintiff has already deposed two critical figures—senior vice presidents.

For these reasons, Plaintiffs Motion to Depose Mulva and Dunham is DENIED.

Plaintiff also seeks copies of unredacted documents that were part of the initial Hart-Scott-Rodino production. After having reviewed the documents at issue, the Court finds that many of these documents appear to have little, if any, relevance to the instant case. Nevertheless, because the parties previously negotiated an Agreed Protective Order governing production of confidential documents herein, the Court finds that unredacted copies of the initial Hart-Scott-Rodino documents should be produced to Plaintiff forthwith, subject to the Agreed Protective Order. Accordingly, the Motion for Immediate Delivery of Unredacted Hart-Scott-Rodino documents is GRANTED.

IT IS SO ORDERED, this 6th day of September, 2002.

/s/ Paul J. Cleary
PAUL J. CLEARY
U.S. Magistrate Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 02-CV-342-H(C)

TRANSEURO AMERTRANS WORLDWIDE
MOVING AND RELOCATIONS LIMITED,
Plaintiff,

v.

CONOCO INC., and PHILLIPS PETROLEUM COMPANY,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON AUGUST 22, 2002
HEARING ON MOTION FOR TRO

Before The Honorable Sven Erik Holmes, Judge

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PROCEEDINGS

[Excerpted from page 116-end]

THE COURT: All right. The Court has reviewed in detail the papers and the briefs filed, as well as the record as it currently exists before the Court. The threshold question of standing here in this particular case is not free from doubt, and indeed I'm not convinced by counsel for the plaintiff that no quantum is necessary, particularly when the record reflects no particular quantum.

However, in the context of the TRO which we are dealing with here, I think that the better part of judgment is to not require a specific quantum for purposes of standing or indeed to take up all that standing entails as a sine qua non for reaching broader issues presented by the request for a temporary restraining order. Therefore, the Court will accept the question of standing for purposes of these proceedings, with the admonition that it has serious questions about whether standing in fact either exists in this case or can be proven in this case, given the requirements that there be specific harm to an individual plaintiff caused by the anticompetitive, alleged anticompetitive conduct of the defendant.

Accepting, arguendo, therefore, standing in this case the Court turns to the four part test for purposes of determining whether to enter temporary restraining order in this case. The Court notes at the outset that the argument has been raised that laches as the access to an equitable relief should control

the determination here. The Court finds that that argument undertakes to prove too much. That is to say that laches, as we understand the equitable concept, does not foreclose access to equitable relief in this context. But as the Court stated in *GTE Corporation vs. Williams*, that is not to say that laches, both as a doctrine and as a set of guiding equitable principles, is lost for all time in this consideration. To the contrary, the Court makes it clear that laches and delay have a place for consideration and that place is in the prong of irreparable harm. So therefore, the Court declines to state and conclude, hold categorically that the laches or delay in this case is disqualifying in and of itself.

Having made that determination then, the Court turns to the various aspects or elements that make up a claim for a temporary restraining order. The Court finds, for the reasons to be stated, that the temporary restraining order will, motion for temporary restraining order will be denied.

The Court finds with respect to those individual claims. The first question is will the plaintiff suffer an irreparable injury absent an injunction. Having said that the doctrine of laches itself is not disqualifying for purposes of access to equitable relief, the Court refocuses the delay that was occasioned in this case and considers it under *GTE* under this prong of irreparable damage. Indeed, as the Court stated in that case quote: "While laches may not be sufficient to bar a permanent injunction it may well be a bar to preliminary relief. A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect plaintiff's rights. By sleeping on its rights a plaintiff may demonstrate the lack of need for speedy action and cannot complain of the delay involved pending any final relief to which it may be entitled in a trial on all issues."

It said: "In holding that delay is an important consideration in the assessment of irreparable harm for the purposes of preliminary injunction."

At the outset the Court underscores that every legally significant fact was known to this plaintiff as of November of 2001, for purposes of coming in here and seeking injunctive relief as against this merger. This is, as the Court finds, as a matter of fact, a case of sleeping on one's rights. That having been said, the Court finds that that necessarily should be included in any analysis of irreparable injury.

Moreover, the Court adds that with respect to irreparable injury, that there is nothing at this time from which to even gauge that there is any injury at all. The speculative nature of the injury here is clear and there is nothing that would establish with the kind of certainty, or in the words of Judge Posner, an appreciable danger or probabilistic, citing his words in *HCA vs. Federal Trade Commission*, that there's nothing here that would meet this irreparable injury prong.

Second, with respect to the balance of harms. Having determined that this is speculative harm in nature, the weight given to the prospective harm to the plaintiff is indeed minimal. By contrast, it is clear that the harm done to the defendants, both in terms of cost invested to date, plus any assertions of long-term planning, that the balance of harms weighs heavily in favor of the defendants.

Third, with respect to the public interest. The Court is not entirely clear that it is necessary to resolve all issues that surround the question of public interest here. As counsel for the plaintiff has sought for this Court to consider, that public interest also may include displaced workers, it may include other kinds of issues, what are characterized here in argument as social or political impacts. Moreover, public interest may be confined to economic matters, that is impact on prices. But having determined that there was no basis upon which to claim that there's an appreciable danger that prices will rise, the Court cannot find that the public interest in maintaining competitive balance is in any way upset by this merger going through.

Finally, with respect to the question of likelihood of success on the merits. The Court finds that there is nothing at this stage that would compel the conclusion that the likelihood of success on the merits should fall on the side of the plaintiffs. Indeed, it is again, unclear, precisely what harm will be occasioned by this merger to this plaintiff. Moreover, the Court notes that it is well settled law that if and to the extent that the alleged harm is occasioned by a termination of a contract by a service provider, as is half of the claim here, or at least one of the two claims here, that the law, *John Lenore & Company*, *Watkins & Son Pet Supplies*, and other of the authorities cited in the papers, make it clear that such a contractual relationship cannot be viewed as a cognizable claim under the antitrust laws, under these circumstances.

So having determined that the plaintiff has not satisfied any of the four parts of the four part test, the motion for temporary restraining order will be denied.

Now, that having been said, it is my intention to set the matter down for a hearing on the preliminary injunction and we will do that. Ms. Holland?

THE CLERK: September 11th, 2002, at 2:00 p.m.

THE COURT: All right. September the 11th, 2002, at 2:00 p.m. The Court notes that this matter is set down for discovery proceedings on August 27th, that is this coming Tuesday. The Court orders that the parties no later than 4:00 p.m. central time, will submit to this Court and to the magistrate judge, those issues and proposals that they believe are appropriate for discovery between the 27th and the hearing on September 11th, and those will be considered overnight here and by the magistrate judge with the hope and expectation of being able to get some guidance in that process on the 27th at that hearing.

All right. Mr. Alioto, is there anything further at this time on behalf of the of Plaintiff, sir?

MR. ALIOTO: Just for clarification, Your Honor. The court said 4:00 p.m. central time, when? I didn't –

THE COURT: Oh, on Monday. The hearing is on Tuesday, right?

MR. ALIOTO: It is, yes, sir.

THE COURT: If you could file that on Monday.

MR. ALIOTO: On Monday.

THE COURT: And that will give the guys in the back an opportunity to get home and get a good night's sleep and then get after it.

MR. ALIOTO: Yes, sir.

THE COURT: All right. Anything else from the plaintiff, sir?

MR. ALIOTO: No, sir.

THE COURT: All right. Anything further from the defendants, Mr. Wohlgemuth?

MR. WOHLGEMUTH: No, Your Honor.

THE COURT: Ms. Schotland, Mr. Cary, anything further?

MR. CARY: Nothing further, Your Honor.

MS. SCHOTLAND: Thank you, Your Honor.

THE COURT: All right. Court is adjourned.

A TRUE AND CORRECT TRANSCRIPT.

CERTIFIED: _____

Glen R. Dorrough
United States Court Reporter

APPENDIX C

For Release: August 30, 2002

With Conditions, FTC Approves Merger of Phillips and Conoco

Rocky Mountain Divestitures Would Maintain Gasoline Refining and Marketing Competition

The Federal Trade Commission today announced a proposed consent order with Phillips Petroleum Company (Phillips) and Conoco Inc. (Conoco) that would allow the merger of the two companies to proceed upon their agreement to sell certain assets and provide other relief. Without these conditions, the Commission stated in its complaint, the proposed merger would violate federal antitrust laws and lead to decreased competition through an increase in the likelihood of coordinated interaction, particularly in the Rocky Mountain region of the United States.

"The Commission's action today reflects our ongoing effort to enforce vigorously the antitrust laws in all aspects of the energy sector," said Joe Simons, Director of the FTC's Bureau of Competition. "Especially noteworthy is our action in the Rocky Mountain region where divestitures will maintain competition in the gasoline refining market."

On November 18, 2001, Phillips and Conoco agreed to merge the two companies, with the combined firm to be known as ConocoPhillips. At that time, it was estimated that the value of the new corporation would be approximately $35 billion.

Parties to the Transaction

Headquartered in Bartlesville, Oklahoma, Phillips is an integrated oil company engaged in the worldwide exploration, production, and transportation of crude oil and natural gas; the gathering of natural gas; the fractionation of raw mix into certain products; refining, marketing, and transportation of petroleum products; and the production and marketing of

chemicals. Phillips has approximately 10 percent of the nation's refining capacity and has about nine percent of the nation's gasoline sales. In 2001 it had revenues of $47.7 billion.

Phillips has significant terminal facilities that it uses to distribute gasoline and other petroleum products. It owns or licenses several gas brands which are sold at approximately 11,700 stations throughout the United States. Phillips owns approximately 1,700 outlets in the Mid-Atlantic and Northeastern United States, where gas is sold under the Exxon and Mobil brands. Of the 10,000 remaining outlets, most are owned and operated by independent marketers and dealers. Phillips also owns slightly more than 30 percent of Duke Energy Field Services, LLC (DEFS), a significant natural gas gatherer, and has interests in many fractionation facilities nationwide.

Conoco, headquartered in Houston, Texas, is also a fully integrated petroleum company engaged in the worldwide exploration, production, and transportation of crude oil and natural gas; gathering of natural gas; fractionation; and refining, marketing, and transportation of petroleum products. In 2001, the company had revenues of $39.5 billion. Conoco has approximately three percent of the nation's refining capacity and three percent of the gas sales in the United States. Conoco owns petroleum product terminals throughout the nation, with its branded gasoline sold at approximately 5,000 stations, most of which are in the Southeast, Southwest, Midcontinent, and Rocky Mountain regions. Most of these stations are owned and operated by independent distributors and dealers.

The Commission's Complaint

According to the Commission's complaint, the merger of Phillips and Conoco as proposed would violate both Section 5 of the FTC Act and Section 7 of the Clayton Act by illegally lessening competition in the following markets: 1) the bulk

supply of light petroleum products in Eastern Colorado and Northern Utah; 2) light petroleum product terminaling services in the metropolitan statistical areas (MSAs) of Spokane, Washington, and Wichita, Kansas; 3) the bulk supply of propane in Southern Missouri, the St. Louis MSA, and Southern Illinois; 4) natural gas gathering in more than 50 sections of the Permian Basin in New Mexico and Texas; and 5) the fractionation processes in Mont Belvieu, Texas.

In each of the markets described above, the FTC's complaint contends that the combination of Phillips and Conoco would allow the new firm to raise prices unilaterally or in combination with other companies and that entry into the relevant markets would be untimely, unlikely, and insufficient to deter or counteract the anticompetitive effects that may result from the merger.

Terms of the Proposed Consent

Under the terms of the proposed order, the companies would be required to: 1) divest the Phillips refinery in Woods Cross, Utah, and all of Phillips' related marketing assets served by that refinery; 2) divest Conoco's Denver refinery in Commerce City, Colorado, and all of Phillips' marketing assets in Eastern Colorado; 3) divest Phillips' light petroleum products terminal in Spokane, Washington; 4) enter into a petroleum products throughput agreement with another terminal services firm that includes an option to buy a 50 percent undivided interest in Phillips' Wichita, Kansas, light petroleum products terminal; 5) divest Phillips' propane terminal assets in Jefferson City, Missouri, and East St. Louis, Illinois, and provide a long-term propane supply agreement; 6) divest certain Conoco natural gas gathering assets in Chavez, Lea, and Eddy Counties in New Mexico, along with Conoco's Maljamar processing facility and natural gas gathering assets in Schleicher County, Texas, and enter into a long-term agree-

ment to process natural gas gathered in Texas; and 7) create firewalls that prevent the transfer of competitively sensitive information among the Mont Belvieu fractionators.

The Analysis of the Proposed Consent Order to Aid Public Comment, which is available on the FTC's Web site as a link to this press release, describes in detail the specific products and services to be divested in each of the asset categories above, related brand licensing agreements and their terms and geographic coverage, the time frame in which the divestitures be completed, and whether prior Commission notification of the proposed buyer would be required. The Analysis also notes that the order would require the companies to maintain the viability and marketability of the assets until they are divested. Finally, for certain divestitures, the Analysis details actions that the order requires the companies take if they are unable to find a Commission-approved buyer within the time allotted.

Also, under the terms of the proposed order, a trustee would be appointed if the companies fail to complete one or more of the required divestitures. The companies also would be required to provide the Commission with compliance reports every 60 days, until each of the divestitures is completed, and to notify the FTC with regard to any changes relevant to the terms of the order. The FTC would have access to the companies' facilities and employees to ensure they are complying with the order. In addition, if any state fails to approve the divestitures specified in the proposed order, the time period allowed for that divestiture would be extended for 90 days. The proposed order would expire 10 years after the date it is finalized by the Commission.

The vote to accept the proposed consent order and place a copy on the public record was 5-0. The proposed consent order will be subject to public comment for 30 days, until October 2, 2002, after which the Commission will determine whether to make it final. Comments should be sent to: FTC, Office of the Secretary, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.